

Ryder Distribution Resources, Inc. and Richard E. Pawlicki and Safety Committee; Maintenance and Repair Committee; Communication Committee; Training Committee; and Wages and Benefits Committee, Parties in Interest. Case 21-CA-27798

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On December 11, 1991, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions. The Respondent filed a reply brief to the General Counsel's answering brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs² and has decided to affirm the judge's rulings, findings,³ and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging its work force of truckdrivers and contracting with an outside firm to provide drivers for its main account. We find below, contrary to the judge, that the Respondent satisfied its burden under *Wright Line*,⁴ of demonstrating that the same action would have taken place even in the absence of protected union activity.

¹ The General Counsel filed a request for special leave to file a reply brief to the Respondent's reply brief. The Respondent filed an opposition to the General Counsel's request. We grant the General Counsel's request.

² The General Counsel has moved to strike the Respondent's 50-page brief in support of its exceptions and to strike the 5-page attachment to that brief entitled, "Declaration of John Selio." The General Counsel argues that the brief and attachment together exceed the 50-page limit for briefs set forth in Sec. 102.46(j) of the Board's Rules and Regulations. We deny the motion to strike the Respondent's brief because the brief itself does not exceed 50 pages. For the reasons set forth at fn. 13, *infra*, we find it unnecessary to pass on the General Counsel's motion to strike the Selio declaration.

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

The judge additionally found that the Respondent violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation and administration of five employee committees, and by contributing financial support to them. The Board has recently articulated in *Electromation, Inc.*, 309 NLRB 990 (1992), which issued after the judge's decision in this case, the standards governing whether employee committees are labor organizations under the Act, and whether an employer's conduct toward such committees constitutes unlawful domination, interference, or support. Applying the principles of *Electromation* to this case, we agree with the judge that the wages and benefits committee under scrutiny here is a labor organization under the Act and that the Respondent's conduct toward it violated Section 8(a)(2). As set forth below, however, we find that the General Counsel failed to carry his burden of demonstrating that the Respondent's conduct was unlawful with respect to the other four employee committees at issue here.

II. FACTUAL BACKGROUND

The Respondent, an affiliate of Ryder Truck Rental, is a contract provider of transportation services for the Smurfit Newsprint Corporation (Smurfit), which is engaged in the business of recycling newspaper and producing newsprint paper. The Respondent employs 26 full-time truckdrivers who pick up newspaper from recycling centers, deliver it to Smurfit for processing, and transport the recycled paper to various newspaper publishers. The Respondent maintains offices, supervision, a dispatching operation, and its fleet of equipment at Smurfit's facility. In November 1989, the Respondent leased specialized trucking equipment from Ryder Truck Rental designed specifically for the Smurfit account. The majority of the specialized equipment was not suitable for use on any of the Respondent's other accounts.

The judge found that the Smurfit account is "one of the Respondent's largest and most important accounts in the United States." The Respondent's contract with Smurfit was due to expire in November 1991.

In February 1990,⁵ the Respondent's drivers contacted Wholesale and Retail Food Distribution Local 63, International Brotherhood of Teamsters, AFL-CIO (the Union). On April 2, the Union filed a representation petition to represent the Respondent's truckdrivers. An election was scheduled to be held on May 18. The Respondent retained a labor consultant to conduct its preelection campaign, which consisted primarily of twice weekly employee meetings at the Smurfit facility. On May 6, the Respondent's employees requested that the Union withdraw the representation petition,

⁵ All dates are in 1990, unless otherwise noted.

which the Union did. The Respondent was notified of the withdrawal on May 16.⁶

A. The Respondent Institutes its "Quality Through People" Program

On June 2, the Respondent conducted a meeting of its drivers in which it introduced an employee participatory program called the "Quality Through People" (QTP) program. The program, which had been introduced at Ryder locations nationwide commencing in late 1989, was described to the drivers as a form of problem solving among the employees to be achieved through the establishment of quality action teams. The drivers expressed their unwillingness to participate, but they were dissuaded from walking out on the Respondent's presentation of the QTP program by the Respondent's offer of \$500 to each driver as a "good faith gesture."⁷ The drivers thereafter were directed to compile individual lists of matters that concerned them, and these were used as the basis for forming five "quality action" teams: the safety committee, maintenance and repair committee, communication committee, training committee, and the wages and benefits committee.

On June 10, the Respondent called a second meeting in which the drivers were asked to volunteer for one of the five committees, and one supervisor or manager was assigned to each committee.⁸ In late June, the Respondent conducted several full-day training sessions during which the drivers were given a hypothetical problem and the Respondent's representatives presented methods for resolving it. The drivers were shown how to brainstorm for solutions, how to arrive at a creative compromise resolution, and how to convince management that it should implement the employees' proposed solutions. The drivers were instructed that employee polling of the work force and reporting the results to management were important problem-solving techniques.

The committees then commenced meeting. The wages and benefits committee met four times and became deadlocked because of a conflict between the Respondent's stated wish that the committee examine alternative methods of dividing up *existing* wages and benefits and the employees' desire for *increased* wages and benefits. The employee-committee members were directed to poll the other drivers concerning the Re-

spondent's various proposals for dividing up wages and benefits; the drivers responded negatively to all the Respondent's proposals. In addition, the Respondent's representative on the committee, District Manager Paul Gates, rejected as too costly the employees' wage proposal.

The judge additionally found that the other four committees also experienced difficulties and met infrequently, and that the employees did not display much interest in the problem-solving process.⁹ The Respondent accordingly discontinued the Quality Through People program in late August.¹⁰

B. Union Activity Resumes

In late July, there was renewed interest in union activity by the drivers. Employee Victor Marchian contacted the Union and began distributing authorization cards to the other drivers in early August. Thereafter, in several conversations with various employees, District Manager Gates commented, "Why should I give you a raise when I know you're going union in October." Employee John Nugent gave the following credited testimony concerning another statement by Gates:

[I]f the Union got in there, that it would put our jobs in jeopardy because it would put us in a bad—put Ryder in a bad position with Smurfit, and that our jobs would be in jeopardy as far as being able to work there.¹¹

C. The Respondent Discharges its Drivers

During the first half of 1990, the Smurfit account was not profitable. The Respondent attributed its non-profitability to driver inefficiency causing excessive "controlled variable costs" (CVCs). CVCs include workers' compensation claims, driver abuse to equipment, bodily injury/property damage to third parties, physical accident damage to equipment, and cargo

⁶The complaint in this case does not allege any unfair labor practices by the Respondent during the preelection campaign.

⁷The judge dismissed the complaint allegation that the \$500 payment constituted an unlawful benefit designed to discourage the drivers from supporting the Union. No exceptions have been filed to this finding.

⁸The judge observed that all the drivers volunteered for a committee with one exception. The judge inadvertently failed to find, as the Respondent notes in its exceptions, that the reluctant driver later volunteered for the wages and benefits committee.

⁹The judge observed that "the record does not reflect what specifically occurred during the meetings of the four other committees or what problems were discussed or resolved, if any"

¹⁰In April 1989, the Respondent had implemented a similar program, designed specifically for the Smurfit account, entitled, "Drivers and Management Equal Success" (Success program). The goal of the Success program was to encourage the drivers to reduce expenses and losses by paying them a monetary amount equivalent to 25 percent of the dollar value of the Respondent's savings based on their improved performance. Monthly reports were posted comparing performance to that of the prior year. The program was unsuccessful, however, and resulted in no monetary awards to the drivers. It was discontinued by the Respondent in April 1990. The complaint does not allege that the Respondent violated the Act by implementing or discontinuing the Success program.

¹¹The judge found, and we agree, that these statements were unlawful threats in violation of Sec. 8(a)(1) of the Act. We reject the Respondent's invitation to draw an adverse inference from the General Counsel's failure to call employee Marchian as a witness to corroborate whether Gates threatened employee Nugent. We note that Nugent testified that he could not recall to whom, if anyone, he related the threat by Gates.

claims. The drivers also maintained a lower miles-per-gallon fuel rating than did drivers at the Respondent's other accounts.

In early September, Zeyad Kudsi, the Respondent's regional distribution manager in charge of 25 accounts including the Smurfit account, decided to discharge the Respondent's drivers and to contract with Transportation Unlimited (TU), a driver leasing company, to provide the drivers for the Smurfit account, using the Respondent's equipment. Kudsi testified that his decision was based on the following factors: the unprofitability of the account; the desire to reduce expenses and thereby be able to submit a competitive bid for the Smurfit account on its expiration in November 1991; the potential for increased business from Smurfit's other facilities nationwide if the present account was successfully rebid; the reluctance of the drivers to play a meaningful role in the Quality Through People program; and potential savings resulting from TU's lower workers' compensation costs. The Respondent has contracted with TU at 36 locations nationwide to provide driver services for its accounts.

The Respondent informed its drivers on September 24 that it had entered into the contract with TU because it had "been unable to bring the anticipated reductions in overall transportation costs for our customer, Smurfit" The drivers were further advised that they were terminated as of the end of that month, but that they were free to apply for positions with TU. TU thereafter hired 5 of the Respondent's 26 drivers. The Respondent made no attempt to dissuade TU from hiring its former drivers. The Respondent granted each driver a \$500 bonus to ensure that they remained until the commencement of the contract with TU on September 30.

III. DISCUSSION

A. *The Discharge of the Drivers*

The judge found that the Respondent unlawfully discharged its work force and contracted out its operation to TU. The judge initially found that the General Counsel had established a prima facie case under *Wright Line*, supra, that the Respondent's conduct was discriminatorily motivated, finding that Gates' threats to employees regarding unionization demonstrated that the Respondent was aware of and opposed to the employees' renewed union campaign. The judge additionally rejected the Respondent's argument that it satisfied its burden under *Wright Line* of demonstrating that the same action and would have occurred even in the absence of protected union activity.

The judge calculated that had the Respondent not spent \$50,000 on its labor consultant, and had it not granted employee bonuses to ensure participation in the Quality Through People program and to ensure that the drivers remained until the contract with TU com-

menced, the Respondent would have had a profitable year. The judge accordingly concluded that it was not driver inefficiency and high CVCs that prevented the Respondent from having a profitable year.

The judge further calculated that the Respondent would not in fact accrue any savings by contracting its operation to TU. The judge reasoned that any savings in workers' compensation costs under the contract would be negated by a weekly per driver service fee owed by Respondent to TU. In this regard, the judge observed the Respondent's failure to present evidence at the trial demonstrating that the contract with TU in fact resulted in increased savings on the Smurfit account. The judge accordingly concluded that the Respondent's true motivation in contracting out its operation was to thwart the resurgence of union activity, rather than to effectuate legitimate business objectives.

Assuming for argument's sake that the General Counsel established a prima facie case under *Wright Line*, we find, contrary to the judge, that the Respondent satisfied its burden of demonstrating that it would have contracted out the work even in the absence of protected union activity.¹²

Although the judge questioned the economic efficacy of the Respondent's decision to contract with TU and found it wanting, "the crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change." *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), enf. in part 137 NLRB 306 (1962). Thus, the Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated. *Liberty Homes*, 257 NLRB 1411, 1412 (1981). See *Texas Instruments v. NLRB*, 599 F.2d 1067, 1073 (1st Cir. 1979) (the issue is "not to determine how the Board would have behaved under similar circumstances but to determine what in fact motivated the employer").

Similarly, contrary to the judge, we do not draw a negative inference from the Respondent's failure at trial to present evidence regarding the performance of the contract with TU. The Board does not require an after-the-fact financial evaluation establishing that a business decision proved successful in order to determine whether the decision was lawfully motivated in the first place. See *Robinson Furniture*, 286 NLRB 1076, 1078 (1987). Rather, the Board considers the factors known to the employer at the time the decision

¹² The Respondent contends in its exceptions that the General Counsel failed to establish a prima facie case because, inter alia, Regional Manager Kudsi alone made the decision to contract with TU and he was unaware of the renewed union campaign. We need not pass on whether a prima facie case was in fact established in view of our conclusion that the Respondent would have engaged in the same conduct even without the employees' union activity.

was made and decides whether the employer's business strategy was chosen for discriminatory reasons.¹³

The Respondent here established that the Smurfit account was one of its largest and most important accounts in the United States, that the Respondent's goal was to successfully rebid the account on its expiration in November 1991, and that Smurfit's nationwide business operation was viewed as a substantial business opportunity for the Respondent. The Respondent further presented evidence that the majority of its specialized equipment for the Smurfit account could not be used on any other account and that the Respondent could not immediately cancel its lease arrangements with Ryder Truck Rental for the specialized equipment.

The Respondent further demonstrated that by late August it was subject to significant economic pressures due to its continuing financial difficulties with the Smurfit account. In fact, the Respondent had been concerned about high driver expenses on the Smurfit account since April 1989—before any of the union activity at issue in this case—when it introduced the Success program to reduce driver expenses and losses. That program was discontinued as unsuccessful, however, and the Respondent presented documentary evidence demonstrating its failure to decrease CVCs expenses and miles-per-gallon costs per driver through 1989 and 1990. In addition, the Respondent has shown that it had contracted with TU at 36 locations nationwide to provide driver services for its accounts and that it had found the arrangement to be advantageous.

The Respondent's regional manager Kudsi acknowledged that there was no guarantee that TU would in fact increase the productivity of the drivers and improve the performance of the Smurfit account. He testified, however, that he viewed the Respondent's operation of the account as a management failure, and that led him "to believe that we weren't going to get where we needed to be, and that was significant improvement to gain renewal of that Smurfit contract." Accordingly, Kudsi concluded that he had no reasonable alternative to replacing the drivers by contracting with TU, a driver leasing company with which the Respondent had had a good experience at other locations.

Rather than substitute our own business judgment for that of the Respondent, as the judge did in outlining a plan whereby the Respondent could have had a profitable year in 1990, we focus on the Respondent's motivation underlying its business decision. We find, in light of all the evidence detailed above, that

the Respondent satisfied its *Wright Line* burden of demonstrating that it would have taken the same action even in the absence of its employees' protected union activity. Cf. *Days Inn Management Co.*, 299 NLRB 735, 745 (1990), *enfd.* in part 930 F.2d 211 (2d Cir. 1991); *Mistletoe Express Service*, 295 NLRB 273, 275–276 (1989).¹⁴ We shall accordingly dismiss that portion of the complaint alleging that the Respondent unlawfully discharged its employees and contracted with TU to provide driver services for the Smurfit account.

B. The Employee Committees

The judge concluded that the five employee committees formed under the Respondent's Quality Through People program were labor organizations within the meaning of Section 2(5) of the Act, and that the Respondent violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation and administration of those committees, and by contributing financial support to them.

In *Electromation*, *supra*, the Board set forth standards for determining whether such employee committees are statutory labor organizations, and whether an employer's conduct toward such committees constitutes unlawful domination, interference, or support. The Board explained that under the statutory definition set forth in Section 2(5) of the Act,¹⁵ the organization under scrutiny is a labor organization if (1) employees participate; (2) the organization exists, at least in part, for the purpose of "dealing with" employers; and (3) these dealings concern "conditions of work" or concern other statutory subjects of bargaining such as grievances, labor disputes, wages, rates of pay, or hours of employment. Further, if the organization has as a purpose the representation of employees, it meets the statutory definition of "employee representation committee or plan" under Section 2(5), and will constitute a labor organization if it also meets the criteria of employee participation and dealing over conditions

¹³ The Respondent's attachment to its brief, "Declaration of John Selio," provides a financial update of the Smurfit account from the commencement of the contract with TU. As noted above, we find this evidence unnecessary to the disposition of this case, and do not rely on the attachment. We accordingly need not pass on the General Counsel's motion to strike the attachment.

¹⁴ We note the judge's finding that the Respondent's hiring of a labor consultant at substantial expense at a time of financial concern indicates that the Respondent deemed unionization unacceptable, and supports a finding that the Respondent was unlawfully motivated in making its business decision. We do not agree. Hiring a labor consultant to conduct an election campaign does not, without more, demonstrate unlawful discriminatory motive. See, e.g., *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 342 (8th Cir. 1986).

¹⁵ Sec. 2(5) of the Act provides:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

of work or other statutory subjects. *Electromotion*, supra at 1007.¹⁶

The Board further explained, in reliance on the Supreme Court's decision in *NLRB v. Cabot Carbon Co.*,¹⁷ that the statutory term "dealing with" is broader than the term "collective bargaining" and applies to situations that do not contemplate the negotiation of a collective-bargaining agreement. "'Dealing with' contemplates a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of those proposals by management.'" *Electromotion*, supra at 995 fn. 21.

The Board further held that although Section 8(a)(2) does not define the specific acts that may constitute domination,¹⁸ a labor organization that is the creation of management, whose structure and function are essentially determined by management, and whose continued existence depends on the fiat of management, is one whose formation or administration has been unlawfully dominated. "[W]hen the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment." Id. at 995. Finally, Section 8(a)(2) does not require a finding of antiunion animus or a specific motive to interfere with Section 7 rights. Id. 995 fn. 24.

Applying these principles to the wages and benefits committee under scrutiny here, we find, in agreement with the judge, that the committee is a statutory labor organization and that the Respondent dominated and interfered with its formation and administration, within the meaning of the Act.

There is no dispute that employees participated in the wages and benefits committee and that the subject matter of the committee concerned a statutory condition of employment. We also find, as discussed below, that the activity of the wages and benefits committee constituted "dealing with" the Employer here, and that the employees acted in a representational capacity within the meaning of Section 2(5).

¹⁶The Board cautioned that the statutory definition of a labor organization may be satisfied even if the group lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues. *Electromotion*, supra at 994.

¹⁷360 U.S. 203 (1959).

¹⁸Sec. 8(a)(2) provides that it shall be an unfair labor practice for an employer

to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

The central purpose of the wages and benefits committee was to address the employees' dissatisfaction with their wages through the creation of a bilateral process involving employees and management in order to reach bilateral solutions based on management and employee proposals. Thus, as the judge found, "it was readily agreed at the first wages and benefits committee meeting that one-hundred percent of the employees were dissatisfied with their wages, and that therefore the wage issue was the first problem to be resolved." Accordingly, the drivers requested at that first meeting a pay increase from the existing wage of \$10.60 per hour to \$12 per hour plus overtime. Gates, the committee management representative, stated that the employees' proposal was not affordable and counterproposed \$12 per hour without overtime. Other forms of pay were discussed at subsequent meetings, including a proposal by Gates of a "stop and mileage" type of pay system. This bilateral exchange between employees and management regarding wages clearly constituted "dealing with" within the meaning of Section 2(5).

The essential premise of the wages and benefits committee was, as the judge found, that the employee-members of the committee "were to agree, after polling the entire employee complement, on wages and benefits that they would like to have the Respondent implement." Indeed, the employee-members of the committee were directed by Gates to poll the other drivers concerning the various proposals discussed in the committee meetings. It is accordingly clear that the employee-members of the wages and benefits committee acted in a representational capacity and that the committee constituted an "employee representation committee or plan" as set forth in Section 2(5).

We additionally find that the Respondent's conduct toward the wages and benefits committee constituted "domination" in its formation and administration in violation of Section 8(a)(2). The Respondent initiated the idea for the committee, sought employee volunteers and used a cash incentive when the employees demurred from participation, assigned a management representative to the committee, and arranged for formalized training sessions to introduce the employees to the Respondent's preferred problem-solving techniques. Further, it was the Respondent that discontinued the committee when it did not progress to the Respondent's satisfaction. We find on these facts that the wages and benefits committee was the creation of the Respondent and that the impetus for its continued existence clearly rested with the Respondent and not with its employees. Accordingly, the Respondent dominated the committee in its formation and administration. In addition, the Respondent unlawfully contributed financial support to the committee, in particular the \$500 payment to employees to induce their participation.

We cannot agree with the judge's conclusion, however, that the Respondent's conduct vis-a-vis the four other employee committees was unlawful. Our review of the record corroborates the judge's finding that virtually no evidence was presented concerning the activity of these four committees. It is axiomatic that the General Counsel carries the burden throughout an unfair labor practice proceeding of proving each element of an unfair labor practice. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983). In light of the paucity of evidence presented regarding the conduct of the four committees, we are unable to conclude that the General Counsel satisfied his burden of demonstrating that these committees constituted "labor organizations." We shall, therefore, dismiss that portion of the complaint alleging unlawful conduct by the Respondent with respect to these four employee committees.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 4 and 5 and delete Conclusion of Law 6.

"4. The wages and benefits committee is a labor organization within the meaning of Section 2(5) of the Act.

"5. The Respondent has violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation and administration of the wages and benefits committee, and by contributing financial support to it."

ORDER

The National Labor Relations Board orders that the Respondent, Ryder Distribution Resources, Inc., Pomona, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge in the event they select Wholesale and Retail Food Distribution Local 63, International Brotherhood of Teamsters, AFL-CIO, or any other labor organization, as their collective-bargaining representative.

(b) Dominating and interfering with the formation and administration of any labor organization, including the wages and benefits committee, and contributing financial support to it.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Pomona, California, copies of the attached notice marked "Appendix."¹⁹ Copies

¹⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all allegations contained in the complaint not found to constitute unfair labor practices are dismissed.

MEMBER DEVANEY, concurring in part.

I agree that the Respondent's conduct regarding the wages and benefits committee violated Section 8(a)(2) and (1).¹ In my view, Ryder's establishment of and involvement in that committee caused precisely the injury to employees' Section 7 rights that Congress intended to prevent in enacting Section 8(a)(2) and that the Board recently considered in *Electromation, Inc.*² In establishing and "dealing with" the wages and benefits committee, Ryder set up a bargaining agent that it could control in place of an agent chosen by the employees themselves and, presumably, exclusively loyal to their interests.³ Moreover, I find Ryder's conduct even more destructive of Section 7 rights than that involved in *Electromation*. Unlike the respondent in *Electromation*, Ryder directly interfered with the drivers' exercise of their statutory right to a representative of their choice by giving them the impression that dealing with it through a dominated employee involvement program would yield more favorable and faster results than union representation, in order to induce them to abandon their petition for a union election.

The relevant facts follow. In spring 1990, Ryder's drivers, discontented with the compensation package offered them, contacted a union, which filed a petition for election after establishing a showing of interest among the drivers. During the union campaign, four employees met with Employee Relations Manager

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹I also agree with my colleagues that the Respondent's discharge of its Smurfit account drivers did not violate Sec. 8(a)(3) and (1), and that the General Counsel has not shown that the Respondent's acts with respect to the safety, maintenance and repair, communication, and training "quality action teams" violated Sec. 8(a)(2) and (1). I also find, as do my colleagues, that under the circumstances here, the \$500 inducement to participate in QTP constitutes unlawful support of a labor organization.

²309 NLRB 990 (1992) (Devaney, concurring).

³This assumes that the Union would have won the upcoming election, as Ryder apparently believed that it would. Of course, the employees could also have voted against union representation.

Sheridan and detailed employees' grievances over working conditions. Sheridan responded that he understood the problems but could not change anything during the campaign; that if employees could bring problems directly to management, resolution of the grievances would be easier; that the drivers did not need a union and that Ryder needed more time to address the employees' concerns; that a union victory would delay the Company's resolution of employee concerns; that the Company had an employee participation program which the employees had yet to experience; and that it was up to the employees to withdraw their petition for election. At the employees' request, the employees withdrew the petition on May 16, and, after thanking the employees for withdrawing the petition and telling them that it would address their concerns in the near future, on June 2 Ryder management introduced an employee involvement program entitled "Quality Through People" (QTP), which the Ryder organization had implemented at other locations.⁴ The judge found, and I agree, that Ryder introduced this program in response to the union campaign, in fulfillment of Sheridan's promise that the Respondent would "work things out."

The wages and benefits committee was one of five established as part of the QTP program. The employees on the committee participated at the behest of the Respondent;⁵ the committee also included Gates, Respondent's personnel manager. From the outset, the Respondent acknowledged, and the committee members understood, that the drivers were dissatisfied with their wages and that the committee's goal was to devise a solution acceptable to the Respondent and to 80 percent of the drivers. Ryder management instructed the drivers on the committee to look at different ways of dividing the total amount of compensation available and to poll their fellow drivers to get their reactions to various ideas. Gates countered the proposals of the employees on the committees and sent the employee members out to find out what their fellow drivers thought of various packages. At the last meeting, the committee deadlocked when Pawlicki, one of the drivers on the committee, asked about a raise for the drivers. Gates told him "[t]hat's not what the committee's about, we're here to look at alternative approaches to dividing up the pie," and he [Pawlicki] wasn't satisfied with that." Shortly thereafter, the wages and benefits

committee was disbanded, Gates and Sheridan agreeing that QTP was not working and that it should not be a forum for bargaining.

The Respondent argues that the QTP program was a genuine employee empowerment program the inception of which was totally unrelated to the union campaign, and that it failed because of employee indifference. The General Counsel argues that the 8(a)(2) allegations involve no threat to genuine employee participation programs, but simply involve a garden variety response to a union campaign with promises of a substitute "union" dressed up as the QTP program. I agree with the General Counsel.

As noted above, I find the Respondent's conduct with respect to the wages and benefits committee caused the harm to employees' Section 7 rights. I note that the committee was established in response to a union organizing campaign, and that the Respondent *explicitly* led employees to believe that dealing with them through the QTP program was a likely future development—if the drivers gave up their efforts to gain union representation.

The Respondent's operation of the committee also involved the usurpation of the employees' right under Section 7 to loyal representatives of their own choosing. The management member of the committee here, Gates, effectively negotiated with the committee, telling the committee that the Company could not afford the hourly rate sought by the drivers and counterproposing lower rates and other schemes. The reluctance of the employees to involve themselves in QTP is the clearest possible indicator that the committee with which Gates was bargaining was not the employees' choice. Thus, in this case, as in *Electromation*, the employer overrode the expressed reluctance of employees to enter into a purportedly bilateral process of arriving at solutions to employee grievances, and explicitly charged the committee members with the task of representing their fellow employees.

I find the Respondent's handling of the wages and benefits committee distinguishable from cases in which an employer delegates management authority to a committee of employees to study and make recommendations with respect to employment issues.⁶ The Respondent's representatives, Gates and Sheridan, were correct in concluding that use of the wages and bene-

⁴My finding that the Respondent's conduct with respect to the wages and benefits committee was unlawful in no way indicates that a Quality Through People program, as practiced by Ryder Systems or any other employer, will always violate Sec. 8(a)(2). Rather, my view that the conduct at issue in this case was unlawful is based on the manner in which the Respondent implemented the program and the specific uses to which the program was put.

⁵As the judge found, the employees were so reluctant to involve themselves that the Respondent offered them each \$500 to hear out its proposal regarding QTP.

⁶As I noted in my concurrence in *Electromation*, supra, such a committee might well fall outside the Act's definition of a labor organization. See discussion of *John Ascuaga's Nugget*, 230 NLRB 275 (1977), and related text, at 1001 of my concurrence. Here, however, the aspects of the committee's activities that might, in other circumstances, distinguish it from a statutory labor organization, e.g., the training in problem solving and consensus building among employees themselves; the attempt to open lines of communication between management and employees; and the rotation of roles on the committee, are so overwhelmed by the committee's clear purpose of substituting for union representation that they cannot rehabilitate the Respondent's conduct toward the committees.

fits committee as a forum for sham collective bargaining was not an appropriate application of a legitimate quality management system and in dismantling the committee.

Finally, I agree with the General Counsel that finding a violation here does not threaten legitimate employee empowerment programs. What was unlawful about the Respondent's behavior here was not the brainstorming session with employees in which they were encouraged to air their job concerns, or the training of employees in problem-solving techniques, or the development of issues for the committees to study. What was unlawful was the establishment and partial recognition of an employee committee charged with representing other employees and negotiating on their behalf as a quid pro quo for dropping the union campaign. In short, although the wages and benefits committee had some trappings of a legitimate employee involvement program, under the circumstances here it operated as a sham bargaining agent foisted on employees, and the Respondent violated Section 8(a)(2) by interfering with its formation and by dominating and supporting it. Thus, I agree with the judge and my colleagues that the Respondent has violated Section 8(a)(2) and (1) with respect to the wages and benefits committee.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with discharge in the event they select Wholesale and Retail Food Distribution Local 63, International Brotherhood of Teamsters, AFL-CIO, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT dominate or interfere with the formation or administration of any labor organization, including the wages and benefits committee, or contribute financial support to it.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

RYDER DISTRIBUTION RESOURCES, INC.

Salvatore Sanders, Esq. and Jeffrey Williams, Esq., for the General Counsel.
Arthur Silbergeld, Esq. and Thomas T. Liu, Esq. (Graham & James), of Los Angeles, California, for the Respondent.

Funflan Persimmon, Esq. (Zetterberg, Persimmon & Smith), of Claremont, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Los Angeles, California, on June 4 through 7, 1991. The Charge was filed by Richard E. Pawlicki, an individual, on November 7, 1990. An amended charge was filed on December 5, 1990. Thereafter, on February 28, 1990, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Ryder Distribution Resources, Inc. (the Respondent) of Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act). The complaint was amended on May 7, 1991. The Respondent's answer, duly filed, denies the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the business of providing transportation services to its customers worldwide, and operates a facility located in Pomona, California. In the course and conduct of its business operations, the Respondent annually purchases and receives goods and products valued in excess of \$50,000 directly from suppliers located outside the State of California, and annually provides services valued in excess of \$50,000 to customers located within the State of California, which customers, in turn, either annually purchase and receive goods and products valued in excess of \$50,000 directly from suppliers located outside the State of California, or annually sell and ship goods and products valued in excess of \$50,000 directly to customers located outside the State of California.

It is admitted, and I find, that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that Wholesale and Retail Food Distribution Local 63, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union) is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings are whether the Respondent, in violation of Section 8(a)(1) and (2) of the Act, established and dominated various employee committees and, in violation of Section 8(a)(1) and (3) of the Act, discharged 26 employees on September 30, 1990, and subcontracted their work to another employer, Transportation Unlimited, Inc.

B. *The Facts*

The Respondent is affiliated with and leases the majority of its equipment, consisting almost exclusively of tractors and trailers, from Ryder Truck Rental; both entities are part of Ryder Systems. The Respondent is a dedicated contract carrier and provides transportation services for various customers or accounts. Specific manpower and equipment is "dedicated" exclusively to each customer on a contract basis. The Respondent's truckdrivers work out of the customers' premises, and pick up, transport, and deliver only the products of the particular account.

The instant cases involve the Respondent's transportation services for the Jefferson Smurfit Newsprint Corporation (Smurfit) located in Pajoma, California. Smurfit recycles newspapers and produces newsprint paper. The Respondent's drivers pick up old newspaper from various recycling centers, deliver it to Smurfit for processing, and then transport the recycled newsprint paper to various newspaper publishers. Smurfit is one of the Respondent's largest and most important accounts in the United States and the Respondent dedicated some 26 full-time drivers and over \$2 million worth of equipment to this account.¹

The Respondent maintains offices, supervision, a dispatching operation, and its fleet of equipment at Smurfit's facility.

In 1986 the Respondent commenced its business relationship with Smurfit's predecessor, Garden State Paper, and entered into a 5-year contract. In 1987 it also entered into a collective-bargaining agreement with Chicago Truck Drivers, Helpers, Warehouse Workers Union. This labor organization continued to represent the Respondent's drivers until the collective-bargaining agreement expired on January 31, 1990.² Shortly before the expiration date the Chicago Truck Drivers Union disclaimed interest in negotiating a successor agreement and withdrew as the drivers' collective-bargaining representative.

Apparently the drivers decided to negotiate their own contract without the assistance of a union, and in early January, prior to the expiration of the contract, various drivers formulated a three-page document proposing wages and benefits over a 3-year period. The first page of the document is entitled "Wage Proposal," the second page is headed "Requests and Suggestions," and the third page contains the signatures

of 29 drivers. Apparently at a meeting scheduled for the purpose of discussing the drivers' concerns, Galen Johnson, one of the drivers, presented the proposal to several management representatives, including Zeyad Kudsi, region distribution manager. The proposals were discussed and Kudsi said that the proposed wage increase was "unrealistic," and that he would get back to Johnson regarding the various items listed under "Requests and Suggestions."

On about January 19, Kudsi presented to employees Galen Johnson and Gerald Hall, who apparently represented all the drivers, a four-page memorandum entitled "Wage and Benefit Improvement." According to Kudsi, this document, which establishes wages and benefits for a 3-year period, was not designed to be a negotiating proposal or counter-proposal to the drivers' prior wage and benefits request. Rather, it was simply a statement of the wages and benefits which the Respondent had decided it would place into effect upon the expiration of the aforementioned collective-bargaining agreement. However, the document explained that the employees, collectively, could elect one of two different wage and benefit options which were specifically set forth, and the option which the majority of the employees selected would be implemented for all employees. The document begins as follows:

Our success at Ryder is firmly based in our ability to provide quality service to our customers which is second to none. As you all know, we accomplish this by being attentive and listening to our customers and each other, as well.

Your supervisors and I have carefully considered the concerns you have expressed concerning wages and benefits. I can assure you, all of Ryder management from the highest levels on down are sincerely interested in compensating all employees equitably, fairly and competitively.

I am therefore pleased to announce the following significant improvements to your total compensation package.

On January 21, the employees met and were presented with the Respondent's "Wage and Benefit Improvement" memorandum by David Freeman and Michael Summers, the Respondent's representatives. Freeman was the Respondent's then-current onsite Distribution Manager, and Summers was designated to assume Freeman's position upon Freeman's departure. About 20 drivers were in attendance. Summers explained the difference between the two benefit packages summarized in the memorandum and, after answering questions, he and Freeman left the meeting so that the drivers could discuss the matter among themselves.

Employee Richard Pawlicki testified that Freeman told the employees that the wage package which the Respondent was presenting was "the best that Ryder could do and we were just going to have to come . . . to terms with it." Freeman also said that if the employees "didn't accept it as such, there would be no further proposals from Miami [the Respondent's corporate headquarters]."

Kudsi testified that he was later advised by Freeman that the employees had elected to accept one of the two wage and benefit packages, and thereafter, effective February 1, the Respondent implemented this particular plan.

¹ The parties entered into a "Stipulation and Protection Order" prior to the hearing in anticipation of the introduction into evidence of confidential commercial and financial information. The commercial or financial information contained in this decision is limited to that information which I deem to be essential for the purposes of this proceeding.

² All dates or time periods herein are within the year 1990 unless otherwise specified.

The drivers were not satisfied with the wage increase they received on February 1, and contacted the Union herein, Teamsters Local 63. Following an organizing drive, the Union filed a representation petition in Case 21-RC-18672 on April 2, and an election was scheduled to be held on May 18. On April 21, the Respondent retained a labor consultant, Mark Garrity, to conduct the Respondent's preelection campaign, and Garrity conducted employee information meetings twice a week at the Smurfit mill. These meetings were also attended by Christopher Sheridan, Respondent's employee relations manager, western area.

Garrity apparently dissuaded the employees from selecting the Union as their collective-bargaining representative. Employee Relations Manager Sheridan testified that he received a phone call from Garrity on May 7, and was told that several employees wanted to meet with him. Sheridan met that day with four employees, Richard Pawlicki, Galen Johnson, Jimmy Jones, and Gerald Hall. The drivers expressed their disappointment with the training they had been receiving; with the type of equipment they were operating which, they said, was not satisfactory for the work they were required to perform; with their wages; and with management. They also said that their ideas were being ignored by supervision. However, they further told Sheridan that they believed they didn't need a union.

Sheridan told them that he could understand their frustrations, but that he could not change anything during a union campaign, and was not going to put the Company at risk of the filing of unfair labor practice charges against it. Regarding the various work-related matters that concerned the drivers, Sheridan stated that it would make things easier if the employees could talk about such matters directly with management, but that it was up to the employees to withdraw the election petition. He told them that a union was not needed to address their concerns; that the Company needed more time to address these issues; and that if the Union prevailed in the election the Company would have to bargain with the Union and collective bargaining "would further delay the Company's ability to address these issues with the employees." Sheridan further told the drivers that since 1989 the Respondent had committed itself to participatory employee relations which the employees had not yet had a chance to experience, and that the Company would be willing to listen to the employees' ideas on alternative pay methods, "but the pie wasn't going to get any bigger." Garrity, who was present at the meeting, suggested that the employees give the Company a chance.

Sheridan testified that at no time during the meeting did he tell the employees that the Respondent would negotiate with them or that there would be any quid pro quo in exchange for the withdrawal of the petition. However, Sheridan did admit telling them that the Respondent "would be able to work out the problems."

Prior to the meeting with Sheridan, the employees had apparently begun to circulate a request to the Union to withdraw the election petition. Such request, dated May 6, and signed by 24 employees, was sent by mail to the Union, and was received by the Union on May 11. It is as follows:

We the undersigned do hereby formally request Teamsters Local #63 to withdraw their petition for collective bargaining from Ryder Distribution Resources.

We understand with this request we have the right to resubmit in four months for resumed bargaining.

Sheridan received a copy of this request in the mail on the same day.

The Union withdrew the petition, and on May 16, the Regional Director for Region 21 wrote to the Respondent that the Union's request to withdraw was approved and that the scheduled election was canceled. The letter states, *inter alia*, that:

the request to withdraw is hereby approved with prejudice to the filing of a new petition by the Petitioner for a period of 6 months from the date of this letter unless good cause is shown why a new petition filed prior to the expiration of such period should be entertained.

Shortly thereafter, apparently on or about the same day, Sheridan caused the following undated memo to all employees, entitled "Withdrawal of Petition," to be posted on the bulletin board:

I am pleased to tell you that I have received word from the N.L.R.B. that the petition for representation filed by Teamsters local # 63 has finally been withdrawn. We have received, by FAX, final approval from the N.L.R.B. Regional Director.

Earlier today I said I would let you know when we received the final paper work concerning this matter and this memo is to inform you that we have!

I wish to thank you all for giving us the opportunity to correct some of the problems that we have been having at this location. I am looking forward to working with all of you on this in the near future. I know that the management here is looking forward to the opportunity as well.

On June 2, the Respondent conducted a meeting of the drivers. Those present on behalf of management were Sheridan, Kudsi, Area District Manager Paul Gates, former onsite Distribution Manager Mike Summers, and the new onsite Distribution Manager Julius Signars, who assumed this position on June 1. Approximately 15 drivers were also present.

Sheridan testified that the purpose of the meeting was to acquaint the employees with an employee participatory program called the "Quality Through People" program which, since late 1989, the entire Ryder system had commenced to introduce on a nationwide basis, regardless of whether employees at the particular facilities involved were represented by labor organizations.³ At the outset of the meeting Sheridan began to describe the process of establishing quality action teams as a form of problem-solving among the employees.

³ A similar program designed specifically for the Smurfit account, initiated in April 1989, was discontinued in April 1990. This program was given the acronym DAMES, meaning "Drivers and Management Equal Success," and was intended to encourage the drivers to reduce expenses and losses through gain-sharing, by payment to them of a monetary amount equal to 25 percent of the dollar value of savings to the Respondent as a result of better performance. Monthly status reports were posted on the bulletin board advising the employees of their performance as compared with the same month during the prior year. The program was unsuccessful, however, and resulted in no monetary incentive awards to the drivers.

ees. He was almost immediately interrupted by Pawlicki⁴ who, according to Sheridan, stood up and asked if the employees were going to get a wage increase. Sheridan said, "No, not at this meeting, that's not the purpose of this meeting. I'm not prepared to talk about that here." One of the drivers said that he thought this was a "bunch of bullshit" to simply delay the discussion of wages, and left the meeting.

Sheridan said that they were there to discuss the problems presented by the employees, and "to start identifying what those issues are so we can start tapping your heads to help fix the problems in your work life." Pawlicki said that he had family from out of town and had better things to do than to listen to this. A number of other drivers started to rise as if preparing to leave the meeting, and Sheridan asked them to sit down while he caucused with Kidsi.

Sheridan and Kudsi discussed the matter in the hallway. It was apparent that the employees were determined to focus the discussion on a wage increase while the Respondent was interested in getting the employees to participate in the problem-solving program; and that the employees were disgruntled and would not cooperate without some incentive. Sheridan convinced Kudsi to offer each of the drivers, whether they were in attendance at the meeting, the sum of \$500 as a "good faith gesture." Sheridan testified that:

Well, [Kudsi] was real uncomfortable with doing that to the account because of the financial shape it was in, and I said, "[Kudsi], if you consider the amount of money involved here, it's a small price to pay to get the process going—to get this employee involvement process going," I said, "I think that we're going to be criticized in not getting this off the ground but for \$15,000.00."

Sheridan and Kudsi returned to the meeting room and told the employees, according to Sheridan, that they would be receiving \$500 as a "good faith gesture on the company's part to convey to the drivers that we weren't jerking them around; I might have even used that phrase with them." This announcement had its intended effect, and the meeting continued.

Sheridan spent about 15 minutes describing the problem-solving technique that would be utilized to allow the drivers to present all of the issues they were concerned about. The drivers were given 5 or 10 minutes to compile individual lists of the matters that concerned them, and then Sheridan asked each driver to read off the first item on his list. This procedure was followed until everyone's list was exhausted. Supervisors also offered items for discussion. Forty-one items were identified in this manner; the enumerated items were placed on a flip chart in the front of the room. These items were then categorized under five separate headings, and Sheridan said that the categories could form the agenda

⁴Employee Richard Pawlicki, the Charging Party herein, testified at length about various matters raised by the complaint. He did not impress me as a credible witness and I do not credit any portion of his testimony which is uncorroborated by other witnesses. As his testimony, even if credited, would not change the result reached herein, I deem it unnecessary to set forth his testimony at length merely in order to discredit it.

for distinct quality action teams.⁵ Sheridan told the employees that the next step after identifying the problems would be to train everyone in problem-solving techniques in order to facilitate the formulating of satisfactory solutions. The discussion of this subject was reserved for subsequent meetings.

The next employee meeting was held on June 10. Sheridan was not in attendance, and Distribution Manager Signars conducted the meeting. There was an explanation of the quality program, and five committees were established corresponding to the five categories which were identified at the earlier meeting, namely, the safety committee, the maintenance and repair committee, the communication committee, the training committee, and the wages and benefits committee. Each employee was asked to select one or more committees in which he was most interested. With the exception of one employee, who was not interested in any committee, each driver volunteered for a committee; and one supervisor or manager was assigned to each committee.

Signars testified that at this meeting there was no conversation or discussion about unions or the solicitation of union cards.

The next step in the Quality Through People program involved the training of the drivers in work-related problem solving. Several full-day training sessions were held in late June, during which the drivers were given a hypothetical problem and the Respondent's representatives presented methods for resolving it. The hypothetical situation involved a shortage of parking spaces in an employer's parking lot; the drivers were to decide on the best method of distributing 500 parking spaces to 600 employees. According to Area District Manager Gates, the drivers were shown how to brainstorm for solutions, how to creatively arrive at a compromise resolution of the problem, and, thereafter, how to convince management that it should implement the employ-

⁵The following topics were placed under the heading "Wages/Benefits": lockers big enough to store equipment; wages and benefits, clear explanation, on benefit coverages and benefit coordinator; hourly vs. mileage, over 200 miles, paid mileage; beautification of worksite-onsite improvements. The following topics were placed under the heading "Maintenance": maintenance problems—RTR and parts inventory; oil buildup on back windows of tractors. The following topics were placed under the heading "Equipment": flatbed tarps not sized or taken care of—storage "liter;" no flatbed anchor hooks; driver's input on equipment changes; bus mirrors on both sides of tractors; misspecified equipment; repair two-way radios; first aid kit in tractors; portable lights on rolloff trailers. The following topics were placed under the heading "Communications": honesty; incentive evaluation—fairness safety review procedures; seniority on work duties, job assignments, support team vs. regular on-site preference; specified offsite customer instructions; reduce customer caused detention; team work and team building; career pathing for drivers—job posting—employee referral program; drivers' newsletter; mill involvement; drivers' appraisal of dispatch/office procedures; customer relations committee; avenue for suggestions and formats; review of reporting forms for suggestions/incidents; scheduling—starting time posted before employee leaves; road condition board. The following topics were placed under the heading "Safety/Training": illegal loads pulled; what is procedure on picking up overloads at outside locations; driver training reevaluation procedures; offsite customer safety issues; reduced driver abuse cost; new hire orientation; drivers' review board for abuse charges; prescaling on loads by tractor type maximum weight for long haul; specific work procedures; first in first out cross-training; DMV test, CDL testing onsite pretest preparation.

ees' proposed solutions. One of the techniques taught in the class was that polling the effected employees was an important tool in convincing management that the solution was acceptable to a majority of the employees.

As mentioned above, one of the committees established at the June 10 meeting was the wages and benefits committee, also called the compensation and benefits committee. Signars designated Gates as the management representative on this committee. The committee met on four different occasions. According to Gates, various members of the committee were given specific functions or roles: Gates was the "facilitator," and various employees were designated as the "recorder," the "team leader," and the "timekeeper."

According to Gates, it was readily agreed at the first wages and benefits committee meeting that 100 percent of the employees were dissatisfied with their wages, and therefore the wage issue was the first problem to be resolved. It was decided that it would be unrealistic to believe that each of the employees would be satisfied with any solution that was also acceptable to the Respondent, and therefore a goal was established of attempting to find a solution that would satisfy 80 percent of the drivers. To this end, the committee, according to Gates, "looked at different ways of breaking up the current pie that had been established from the wage scale set back in January of '90."

After three committee meetings and various pollings of the 26 drivers, the committee members became frustrated with the process; the Respondent wanted them to reach a consensus on how to divide up a given quantifiable pie, and the employees simply wanted a larger pie to divide. In late August, at the fourth, and final, committee meeting, according to Gates:

[Pawlicki] . . . brought up the fact that he wanted to know if they were going to get a raise, that this committee had been moving on for quite a while and there wasn't—he wasn't seeing any results. I basically told him that, "That's not what this committee's about, we're here to look at alternative approaches to dividing up the pie," and he wasn't satisfied with that. And I said, you know, "We're not going to sit here and discuss X specific type of raise increases, that's not what . . . it's about."

Various committee members walked out, and, according to Gates, "The meeting pretty much disintegrated at that point, and that was about it."

Gates spoke to Employee Relations Manager Sheridan immediately after this meeting, and advised him that the process was not working, that Pawlicki appeared to be attempting to "drag [Gates] into negotiations," and that Gates was of the opinion that wages should not be included within the quality action problem-solving process. Sheridan agreed, and further suggested that the program be discontinued, as the Respondent had not intended that the Quality Through People program become a forum for collective bargaining.

While the record does not reflect what specifically occurred during the meetings of the four other committees or what problems were discussed or resolved, if any, Gates testified that the other committees were experiencing similar difficulties; they were meeting infrequently, and the employees did not display much interest in the problem-solving

process. As a result, in late August, the Quality Through People program was discontinued. According to Gates, the program was unsuccessful because, "There was a core group of drivers who just didn't want to make the process work, they didn't really want to pitch in and get involved."

John Nugent began working for the Respondent in March 1987 as a driver. He, together with about six other drivers, was a member of the wages and benefits committee. At the first committee meeting, according to Nugent, the drivers requested an hourly wage increase from their current wages of \$10.60 to \$12 per hour plus overtime. Gates replied that the Company had previously allocated a certain amount of money for wages, and that the drivers on the committee should try to "work out a program where they would basically redistribute that amount of money . . . so that the drivers, you know, if they worked hard or whatever, could make themselves more money, but it wouldn't cost Ryder any more money." Gates, according to Nugent, said the Company could not afford \$12 per hour plus overtime, but that \$12 per hour straight time, with no overtime premium, might be feasible. Nugent was to poll all the drivers and report back to Gates at the next meeting.

At the next committee meeting, a week or two later, Nugent, who had polled the employees regarding Gate's suggestion of \$12 per hour with no overtime, reported that all the drivers were opposed to the Company's proposal. Other forms of pay were discussed, and Gates suggested that the drivers be polled again regarding a stop and mileage type of pay system. At the following meeting, in late August or early September, it was reported that the drivers also rejected this proposal. There were no further proposals, and the committee was stalemated regarding wages.

During this period of time there was renewed interest in the Union, and one of the employees, Victor Marchian, once again began soliciting employees' signatures on authorization cards so that the Union could petition for a new election. Marchian testified that he contacted the Union in about late July and began distributing the cards to the drivers in early August.

Nugent testified that at the conclusion of the final committee meeting in late August or early September, he and Gates were walking together and discussing what had occurred, and Gates told Nugent that the Company, at that point in time, could not even offer the employees \$12 per hour straight time. Gates went on to say, according to Nugent, that the Company might just as well save the money because in October "you guys are going to be voting the Union in," and the Company would not have to give the employees a raise during the 2 or 3 years it would take to get a contract signed. Nugent told Gates that the current union support wasn't as strong as it had been during the earlier organizing campaign, and Nugent wasn't sure whether the Union would prevail in an election. Gates, according to Nugent, said that he was confident that the Union would win the election, and that there would be a union at Smirfit. He also said:

that if the Union got in there, that it would put our jobs in jeopardy because it would put us in a bad—put Ryder in a bad position with Smirfit, and that our jobs would be in jeopardy as far as being able to work there.

Gerald Hall, a driver, began working for the Respondent in June 1987. He was on the safety committee together with five other drivers. Signars was the management representative on this committee. Hall testified that in late August or early September, following a safety committee meeting which both Signars and Gates attended, Hall shouted something and walked out of the room during the meeting as a result of a comment by Signars that the employees were going to have to begin co-paying together with the Respondent for certain health insurance benefits. Hall proceeded to his truck. Gates followed Hall to his truck, got into the cab, and asked what the problem was. Hall testified that he and Gates began discussing wages, and Gates said, "Why should I give you a raise when I know you're going Union in October?"

Gates testified that he did have a conversation in the cab of Hall's truck. Gates explained that he attended the committee meeting merely as an observer, and that he was upset that Hall had bolted from the meeting as he had heard that Hall was a leader of the group and was expected to participate in the meeting. Gates told Hall that he was setting a bad example for the rest of the group, and that, "We can't have this. This isn't going to work." Gates testified that he had not heard about any renewed union activity, and did not say anything to Hall about the Union.

Galen Johnson was employed as a driver by the Respondent in December 1986. He was a member of the maintenance and equipment committee. He attended two committee meetings during which various methods of lessening driver abuse on the equipment was discussed. He attended a wage and benefits committee meeting in the last part of June or the first part of August. During this meeting Gates said that "the Company wasn't going to offer any more money because they knew that we were going back to the Union." During a subsequent drivers' weekly meeting, not a committee meeting, Signars mentioned that the drivers were going to have to begin making co-payments for insurance. Johnson objected to this, and Gates said, "Well, you know, you're going to [go] Union anyway, and the Union's going to start their co-payment also."

Victor Marchian was employed as a driver in March 1988. He became a member of the training committee. Marchian testified that in the latter part of May, Gates asked him what it would take "to get the drivers to go non-union." Marchian replied that the employees should be given the raise that had been promised to the drivers since late 1988. Marchian further testified that in late July or early August he overheard a conversation between Gates and Larry Calderon, a driver. Gates said something to the effect that it would not matter if the drivers were given a raise because they are going Union.

Larry Calderon, who testified in this proceeding on behalf of the General Counsel, was not questioned about his alleged aforementioned conversation with Gates.

The Smurfit account was not profitable for calendar year 1990. The Respondent's anticipated net income before taxes for 1990 according to a budget or "plan" prepared prior to the beginning of the year, was approximately \$137,000, whereas the Respondent actually incurred a small loss of about \$8700 at year's end. The Respondent attributed a large percentage this loss to excessive controllable variable costs (CVC). Costs in this category are workers' compensation

claims, driver abuse to equipment, bodily injury/property damage to third parties, physical accident damage to equipment, and cargo claims. The Respondent does not maintain that any particular drivers were responsible for causing it to incur inordinate expenses within this category, but rather that its drivers, collectively, were simply inferior, in terms of safety and maintenance of equipment, than the drivers employed by the Respondent at other accounts. Further, the Respondent maintains that the Smurfit drivers, collectively, were less careful or efficient than drivers employed at other accounts, as evidenced by the fact that the annual miles per gallon was slightly less among the Smurfit drivers as compared with similar statistics for other accounts.

Zeyad Kudsi, Respondent's region distribution manager for region H, is in charge of 25 accounts within his three-state region (California, Nevada, and Arizona). Kudsi testified that after consulting with some of his counterparts in other regions who used the services of Transportation Unlimited, he alone decided to discharge the Respondent's drivers and to contract with Transportation Unlimited, a driver leasing company which furnishes only drivers and utilizes the Respondent's equipment, to provide the drivers for the Smurfit account; and he merely informed his superior, Area Field Vice President Mike McCanta, that he had done so.

Explaining the reasons for his decision to lease drivers from Transportation Unlimited, Kudsi enumerated various factors: the unprofitability of the Smurfit account; the desire to keep the account because of the potential for increased business from Smurfit's numerous facilities throughout the country, and, in this regard, to be able to rebid the Smurfit contract upon its expiration in November 1991 at a rate that Smurfit would find acceptable; the realization that the hiring of Signars to replace Dave Freeman as Distribution Manager did not appear to be resolving the problems with the drivers; and the drivers themselves, who, despite improvements in their wages and benefits at the expiration of the collective-bargaining agreement with the Chicago Truck Drivers Union, continued to demonstrate their reluctance to play an active and meaningful role in the Quality Action program, which, according to Kudsi, was designed to provide the incentive for the employees to become more productive. Kudsi summarized his belief that the foregoing factors "just led me to believe that we weren't going to get where we needed to be, and that was significant improvement to gain renewal of that [Smurfit] contract."

Kudsi explained that although the wages and benefits paid to the drivers by Transportation Unlimited did not necessarily reflect a savings to the Respondent, the fact that Transportation Unlimited was able to purchase workers' compensation insurance at a rate "20 to 25 percent lower than my internal charge-out rate" was a significant motivating factor in the decision to subcontract the drivers. Sheridan, who was more conversant with such costs, elaborated upon this matter as follows:

[The Respondent] is self insured, and the premium, if you will—It's really not an insurance premium, but the cost that's charged out to each of the locations within Ryder Distribution Resources out of Miami, Florida are based on the experience that Ryder has coast to coast. So arguably, as our . . . workers' comp costs are reduced by having less accidents, that keeps the cost

down and we don't have to fund the outstanding workers' comp liability as heavily, versus a company like Transportation Unlimited that doesn't have much experience in California . . . Transportation Unlimited has only Smurfit and the two northern California locations where they do business in California, that being the case . . . their experience rating is probably the lowest it can be . . . consequently the rate is . . . 15, 20, 25 percent less than what we're paying.

According to financial records introduced into evidence by the Respondent, its total controllable variable costs for 1989 and 1990, respectively, were \$109,960 and \$107,060, whereas the budgeted amount⁶ in this category for 1990 was \$51,000; and the largest cost within this category for both 1989 and 1990 was for "driver abuse," in the amounts of \$47,632 and \$67,170, respectively, whereas the budgeted amount for driver abuse for 1990 was \$21,000. Its 1989 "Workers' Compensation Deduct"⁷ costs were \$26,162, and its 1990 "Workers' Compensation Deduct" costs were \$25,505.

Kudsi testified that he and Sheridan made the decision to hire labor consultant Mark Garrity to conduct the Respondent's preelection campaign. Garrity was paid \$50,000 for his services.

Prior to executing the driver leasing contract with Transportation Unlimited, Kudsi initiated a meeting with Gates and Signars, but Kudsi explained that "for all practical purposes" his mind was made up. In mid-September he instructed Signars to prepare a letter notifying the drivers of the termination of their services.

The Respondent has contracted with Transportation Unlimited for the driver leasing on two other accounts in region H, one in Sacramento, and one in San Francisco. However, according to Kudsi, in both instances this arrangement occurred when the Respondent first obtained the accounts, at which time neither the Respondent nor its two customers had drivers who were readily available. Thus, the Smurfit account is the only account in Kudsi's region which, during the term of a contract, resulted in the discharge of the entire work force and the contracting of the driver work to a driver leasing company.

Since the contracting of Transportation Unlimited, the Respondent has continued to have some account management people located at the Smurfit premises, but has been able to eliminate two supervisors. Kudsi testified that Transportation Unlimited has a driver/supervisor who does all the hiring and

discipline and supervises the other drivers; this supervisor works out of Respondent's offices at Smurfit.⁸

Kudsi testified that despite excessive controllable variable costs and the lack of driver cooperation, he never gave the drivers an ultimatum to the effect that they should expect adverse consequences in the event they fail to improve their performance, reduce the controllable variable costs, and cooperate with the Respondent's Quality Through People program. Kudsi said that he did not want to confront the employees; rather, he merely tried to enlist their voluntary support.

Kudsi stated that there were no guarantees that the new drivers hired by Transportation Unlimited would perform as well as the discharged drivers, or that Smurfit would be satisfied with the new drivers. Kudsi said, however, that he believed the Respondent's prior experience with Transportation Unlimited had been good and he anticipated that it would hire proficient drivers. Kudsi testified that:

All I can say is that the decision was based on that we had not been successful in achieving success in those specific areas, you know, which you may look at as a management failure. We had not been successful with the prior group.

The Respondent did not furnish its driver personnel files to Transportation Unlimited; it took a hands off approach and made absolutely no attempt whatsoever, either favoring or disapproving of the hiring of any of its drivers, to influence that company's hiring process. As a result, only 5 of the Respondent's 26 permanent drivers became employees of Transportation Unlimited.⁹ Kudsi acknowledged that the Respondent's drivers, upon being discharged, were referred to Transportation Unlimited; and, as there was no attempt by the Respondent to dissuade Transportation Unlimited from hiring the Respondent's employees, that it was conceivable that Transportation Unlimited could have hired the very driver complement that the Respondent discharged. However, according to Kudsi, there was an economic benefit from Transportation Unlimited's lower workers' compensation costs alone which would have decreased the Respondent's expenses, and Kudsi testified that, "And, I'll stretch, that they would add a new manager that would have been looking over [the drivers]. So maybe it's a fresh start there also." When asked whether it was his opinion that the same employees would "work better" for Transportation Unlimited than they would for the Respondent, Kudsi stated, "I can't tell you one way or the other, but I would suspect yes."

Sheridan testified that he learned about the subcontracting in early September. Exhibits introduced by the Respondent contain financial information showing that other accounts in region H, in addition to the Smurfit account, were unprofitable, some much more so than the Smurfit account. Sheridan was not familiar with the particular reasons why these other

⁶The Respondent's records introduced into evidence give budgeted or "plan" amounts only for 1990, and do not contain the corresponding budgeted amounts for 1989.

⁷There is some confusion in the record regarding the amount of the Respondent's workers' compensation costs. As noted, the Workers Compensation "Deduct" listed under the heading of controllable variable costs amounted to \$25,505 for 1990, whereas there was no budgeted amount listed for this item. However, under another heading in the Respondent's summary profit and loss statement, entitled "Wages, Benefits & Taxes," an item named "Workers' Comp. Premium" shows that for 1989 and 1990 the Respondent paid \$154,682 and \$94,034, respectively, apparently for such insurance, whereas for 1990 the budgeted amount was \$180,974. There was no clarifying record testimony to explain the differences in the two distinct workers' compensation items.

⁸This testimony of Kudsi should be compared with the terms of the contract between the Respondent and Transportation Unlimited, *infra*.

⁹The amended charge herein alleged that Transportation Unlimited was the alter ego of the Respondent, and that both entities were responsible for the alleged 8(a)(3) violations. However, the Region dismissed this portion of the charge, and the Board, on appeal, sustained the dismissal of the allegations.

accounts were not subcontracted, or whether their losses were attributable in part to controllable variable costs. When asked why it would not be beneficial to subcontract all the Respondent's accounts in order to take advantage of lower workers' compensation costs through either Transportation Unlimited or another driver leasing company, Sheridan testified:

There's a lot more issues involved than just the workers' comp. Our preference is not to subcontract driver leasing—to driver leasing companies. You . . . do lose a degree of control, they're not our drivers, and that's a down side to having a driver leasing company there. So the—in direct response to your [question], we prefer to keep our drivers—to keep the driving forces employed by us, we do that only where there's financial difficulties.

Gates testified that at a meeting in early September, Kudsi convinced Gates and Signars that it was in the Respondent's best interests to subcontract the work. Gates initially disagreed with the decision and "looked at it as a defeat, that I wasn't able to turn the situation around," particularly as he believed that Signars, a "strong people-oriented manager," could have motivated the employees.

Signars testified that the decision to subcontract took him by surprise, and he did not know anything about it until the meeting in early September. At the meeting Kudsi asked the participants for their input, and Signars, in an attempt to convince Kudsi that subcontracting was not necessarily the best alternative, expressed the fact that his main objection to subcontracting was the "training curve, learning curve of the [new] drivers." Thus, according to Signars, "we would have to, you know, put that much additional training if we changed the driving force, that was . . . my main negative to it." Signars said that the Respondent had 12 meetings with Smurfit "and advised them of our decision."

Gates, Sheridan, Kudsi, and Signars each specifically denied that they made statements to any group of employees or to any individual employee in July or thereafter regarding the Union. They did not tell any employees that a raise would not be forthcoming because they knew or suspected that the drivers were going to vote for the Union in October, or that they believed the employees were going to go Union at any time in the future. Nor did they know or suspect that the drivers had again contacted the Union and that the Union had renewed its efforts to organize the drivers. Rather, the decision to contract with Transportation Unlimited was for legitimate economic and business-related reasons only, and the drivers' possible selection of the Union as their collective-bargaining representative was not a factor in the decision-making process.

The contract between the Respondent and Transportation Unlimited was entered into on September 10, and became effective on October 1. The contract specifies that:

the term of this Agreement shall be indefinite and shall run until cancelled by either party upon thirty (30) days written notice prior to the effective date of termination.

The contract provides that Transportation Unlimited will furnish to the Respondent "such drivers as it may require to operate motor vehicle equipment owned or leased by" the Re-

spondent, and "shall be the employer of such drivers." The contract enumerates five duties imposed upon Transportation Unlimited, including the obligation to provide workers' compensation insurance coverage for the drivers.

The contract provides that the Respondent will prepare and keep all work record, records of hours worked, certificates of physical examination, driver logs, vehicle inspection and condition reports, and any other documents. In addition, the contract specifies:

That [Respondent] at all times will solely and exclusively be responsible for maintaining operational control, direction and supervision over said drivers, such control, direction and supervision including, but not being limited to scheduling and dispatching of the drivers, routing instructions, loading and unloading procedures and other matters relating to driving and any other day-to-day contract carriage¹⁰

[Transportation Unlimited] agrees that as the employer of the drivers furnished to [the Respondent] it [Transportation Unlimited] shall assume the sole obligation of dealing with any labor organization representing or claiming to represent such drivers.

The contract further provides that "for each driver furnished" to the Respondent, the Respondent will pay Transportation Unlimited certain amounts, including \$11.50 per hour (new hires are to receive \$10.50 per hour with incremental increases of \$.50 per hour every 3 months until the \$11.50 amount is reached),¹¹ \$100 per month "per bonus qualifications,"¹² 8 holidays, up to 15 days' vacation per year depending on length of service, and benefits including hospitalization benefits (after a 60-day probationary period). Further, for each driver furnished, the Respondent is to pay to Transportation Unlimited the following: a service charge of \$35 per driver per week; FICA of 7.65 percent; State Unemployment Compensation of 3.1 percent; Federal Unemployment Compensation of .8 percent; and Workers Compensation of "14.95 percent of drivers gross wage (guaranteed until September 30, 1990)."¹³

On September 24, Signars distributed a letter to the drivers advising them that because the Respondent "has been unable to bring the anticipated reductions in overall transportation costs for our customer, Smurfit Newsprint Corporation," it has entered into an agreement with Transportation Unlimited "to manage and supervise the day-to-day operation of the driver work force, while [the Respondent] concentrates on bringing additional value-added services to this customer." The letter advises the drivers that their employment with the

¹⁰ This particular clause of the agreement appears at the bottom of the third page of the contract and does not carry over to the next page. It is apparently incomplete.

¹¹ The record does not indicate whether Transportation Unlimited considered all of its drivers to be new hires, or whether it hired the Respondent's five former drivers at a rate above the new hire rate.

¹² The record does not reflect the manner in which the employees earn such bonuses.

¹³ As noted above, the contract did not become effective until October 1. Thus, it would appear that the guarantee period for the 14.95 percent workers' compensation rate extended to September 30, 1991 rather than 1990.

Respondent will be terminated on September 30, and that they may apply to Transportation Unlimited if they “wish to be considered for employment.” In addition, the letter specifies that a \$500 bonus will be paid to each driver who remains at the account until September 30.

C. Analysis and Conclusions

The complaint alleges that each of the five aforementioned employee committees established by the Respondent is a labor organization within the meaning of Section 2(5) of the Act, and that the Respondent has violated Section 8(a)(2) of the Act by unlawfully assisting and dominating such labor organizations.

The establishing of the committees had its genesis immediately following the Regional Director’s May 16 notification to the Respondent that the representation petition had been withdrawn. Thereupon, Sheridan caused to be posted on the bulletin board a memo expressing the Respondent’s pleasure with this development. The memo continues as follows:

I wish to thank you all for giving us the opportunity to correct some of the problems that we have been having at this location. I am looking forward to working with all of you on this in the near future. I know that the management here is looking forward to the opportunity as well.

Two weeks later the employees were invited to the June 2 meeting during which they were presented with the guidelines the Respondent intended to utilize in an effort to implement managements’ promise to work with them in order to correct some of the problems at the Smurfit account; and it paid each employee, whether at the meeting or not, the sum of \$500 (totaling approximately \$15,000, according to Sheridan) to keep them from walking out. Some 41 problems or concerns were identified at this time.

At the following June 10 meeting the Respondent established the five committees to deal with these problems, and the drivers were requested to volunteer for one or more of the committees. In addition, the Respondent placed supervisors or high ranking management representatives on each committee. Thereafter the Respondent, in formalized classes, taught the employees how they were to go about solving their problems. Following this process, the committees began their work.

The names of the committees appear to be a fair representation of the type of problems or concerns the Respondent expected the committees to address: safety, maintenance and repair, communication, training, and wages and benefits. While the record does not contain details of committee meetings other than the wages and benefits committee, it is clear that the Respondent expected the employees to actively participate, and even singled out employees for leadership roles. Thus, as Gates testified, he became perplexed and upset with employee Gerald Hall, who abruptly walked out of the safety committee meeting, and told Hall that he was setting a bad example for the rest of the group, and that, “We can’t have this. This isn’t going to work.”

Clearly the most important committee, insofar as the employees were concerned, was the wages and benefits committee. Here, the employees were to agree, after polling the entire employee complement, on wages and benefits that they

would like to have the Respondent implement. According to Gates, the committee “looked at different ways of breaking up the current pie that had been established from the wage scale set back in January of ‘90.” When the employees finally realized that the wages and benefits committee was a sham, as far as they were concerned, and that the Respondent intended to confine their wage and benefit requests within unilaterally established parameters, they became more assertive. In Gates’ words, they were attempting to “drag [Gates] into negotiations;” and at that point Gates recommended to Sheridan that wages should not be included within the quality action problem-solving process. Thereupon, the Quality Through People program was abandoned as, according to Gates, quoting Sheridan, the Respondent had not intended that the Quality Through People program become a forum for collective bargaining.

Section 2(5) of the Act defines a labor organization as:

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The various committees were to address the 41 topics, set forth above, which were identified at the June 2 meeting. The topics to be discussed and/or resolved by each committee clearly deal with those encompassed within the Act’s definition of “labor organization,” namely, grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The Respondent maintains that the Quality Through People program was not a new innovation and was not initiated as a response to the employees’ union activity; rather, the program had been initiated on a companywide basis prior to the events involved herein. Further, the wages and benefits committee, as the employees’ representative in resolving their wage concerns, did not “deal with” the Respondent within the meaning of Section 2(5), since “dealing” connotes an open-ended give and take relationship, whereas the Respondent confined the matter of wages within unilaterally established limits.

Regarding the Respondent’s first contention, the record shows that its immediate response to the withdrawal of the election petition was to thank the employees for giving it an opportunity to resolve their concerns, and to advise them that this matter would be addressed in the near future. Two weeks later the Respondent initiated its Quality Through People program. The Quality Through People program, although in existence nationwide and initiated by the Respondent at other facilities, was not introduced at the Smurfit account until immediately after the union activity had commenced. Such a sequence of events, absent convincing evidence that the Respondent had commenced to introduce the program prior to any union activity, clearly demonstrates that the program was implemented as a response to such union activity.

Further, it is established, as stated by the Supreme Court in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), in reversing the court of appeals, that:

The Court of Appeals was therefore in error in holding that company-dominated Employee Committees, which exist for the purpose, in part at least, “of dealing with employers concerning grievances . . . or conditions of work,” are not “labor organizations,” within the meaning of Section 2(5) simply because they do not “bargain with” employers in “the usual concept of collective bargaining.” (Emphasis in original.)

To be sure, the wage and benefits committee, during discussions with the Respondent through its committee representative, Area District Manager Gates, found the limitations imposed by the Respondent to be inhibiting and unacceptable. But such or similar limitations are frequently imposed by employers even during the course of collective bargaining; and the fact that the employees here did not elect to strike or withhold their services in order to underscore their demand for a substantial wage increase does not negate the fact that the employees, through the wage and benefits committee, were “dealing with” the Respondent on this matter.

The record evidence establishes that each step of the Quality Through People program, from beginning to end, was orchestrated and conducted by the Respondent; it paid each of its employees a substantial sum of money in exchange for their support and cooperation; and indeed, the Respondent’s domination of the committees included the very act of disestablishing them when the drivers’ assertiveness became uncomfortable.

On the basis of the foregoing, I find that the various employee committees were labor organizations within the meaning of the Act. I further find that by the conduct set forth above, the Respondent has dominated and interfered with the administration of the employee committees and has contributed financial or other support to them in violation of Section 8(a)(2) of the Act. See *North American Van Lines*, 288 NLRB 38, 49–52 (1985), revd. on other grounds 869 F.2d 596 (1989); *U.S. Marine Corp.*, 293 NLRB 669, 687–688 (1989); *Superior Container*, 276 NLRB 521 fn. 3, 528 (1985); *Homemaker Shops*, 261 NLRB 441 (1982), revd. in part 724 F.2d 535 (1984). Cf. *General Foods Corp.*, 231 NLRB 1232, 1235 (1977), and *Scott & Fetzer Co.*, 691 F.2d 288 (6th Cir. 1982), cited by the Respondent. In *General Foods* the team employees in the employer’s job enrichment program were found to have been acting on their own behalf and in their own individual capacities rather than collectively dealing with management; and, unlike the situation herein, in both *General Foods* and *Streamway* it was deemed significant that the establishment of the employee committees was not in response to any union activity by the employees.

I credit the testimony of employee John Nugent and find that in late August or early September Gates told him that the Respondent might just as well save the money that the employees were requesting because in October “you guys are going to be voting the Union in,” and the Company would not have to give the employees a raise during the 2 or 3 years it would take to get a contract signed. I also find that during this same conversation Gates told Nugent that the employees’ jobs would be in jeopardy if the Union got in as it would put Ryder in a bad position with Smurfit.

I find that, as alleged in the complaint, the latter remark by Gates constitutes a threat of job loss in the event the

Union is voted in, and is violative of Section 8(a)(1) of the Act.

I further credit the testimony of employees Gerald Hall and Galen Johnson, who, like Nugent, each stated that in August or September Gates expressed to them the Respondent’s expectation that the drivers would select the Union as their collective-bargaining representative. They appeared to be credible witnesses with clear recollections of the various remarks by Gates. Further, I credit the similar testimony of employee Victor Marchian who overheard Gates telling another employee, Larry Calderon, the same thing. Since Marchian’s testimony is essentially corroborative, it appears that it should not be discredited simply because Calderon was not questioned about this matter.

Moreover, it is likely that Gates would have anticipated the renewal of union activity among the drivers. Thus, the drivers requested that the Union withdraw its representation petition with the understanding that after four months the employees reserved the right “to resubmit . . . for resumed bargaining;” further, the Regional Director advised the parties, in writing, that the Union could refile the representation petition in 6 months; and finally, it was clear that despite the Respondent’s efforts, the employees continued to be insistent on a substantial wage increase which the Respondent was unwilling to grant.

As a result of the foregoing, it may reasonably be presumed that the Respondent’s representatives were aware, upon the demise of the Quality Through People program in August or September, that renewed union activity was imminent. Such a readily apparent presumption is clearly supported by the abundant record evidence even in the absence of Gates’ explicit statements to that effect.

Following the General Counsel’s presentation of a prima facie showing that the Respondent’s September 30 discharge of its entire work force was discriminatorily motivated, it is incumbent upon the Respondent to establish that it would have discharged the employees even in the absence of any anticipated union activity. *Lear Siegler, Inc.*, 295 NLRB 857 (1989); *Wright Line*, 251 NLRB 1083, 1089 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). I find that the General Counsel has clearly made the requisite showing. I further find that the Respondent has failed to carry its burden of persuasion.

It is significant that the Respondent, during a period when its profitability was well below what had been anticipated for 1990, elected to spend \$50,000, a substantial unbudgeted sum of money, to influence the employees to vote against the Union; this tends to devalue the testimony presented by various Company witnesses that, as evidenced by the fact that many of its facilities are unionized, the Respondent did not disfavor a union at Smurfit. Indeed, as found above, Gates specifically told Nugent that the employees could lose their jobs if they went union because this would put the Respondent in a bad position with Smurfit.

The Respondent spent an additional amount of approximately \$13,000 (\$500 for each of the 26 drivers) in an effort to keep the drivers from summarily rejecting the Quality Through People program. When this program failed, it spent another similar amount, again totalling approximately \$13,000, as a bonus to each employee for remaining in the Respondent’s employ until September 30.

From the foregoing, it appears that excessive controllable variable costs did not preclude the Respondent from making a profit in 1990. Indeed, absent the above-enumerated expenses, the Respondent's \$8700 loss would have amounted to a \$67,000 profit, nearly 50 percent greater had the Respondent not, in effect, granted a wage increase of approximately \$1 per hour, after two incremental increases, to the employees of Transportation Unlimited.

Regarding the savings which the Respondent maintains it enjoyed as a result of Transportation Unlimited's lower workers' compensation rate, the Respondent's records show, as set forth above, that it anticipated the payment of \$180,974 in "Workers Comp. Premium" for 1990. Assuming that the workers' compensation rates of Transportation Unlimited were some 25 percent lower, as testified to by the Respondent's witnesses, this would translate into a savings of approximately \$45,000 on an annualized basis. However, this amount of savings is more than negated by the service fee to Transportation Unlimited of \$35 per week per driver; assuming a continuing driver complement of 26 employees, the service fee would total over \$47,000 per year. Thus, it appears that on an annual basis there would be no net savings to the Respondent.

It should be further noted that the hearing in this matter was held in early June 1991, and that the Respondent's experience with Transportation Unlimited up to that point had been ongoing for eight months. Nevertheless, the Respondent provided no evidence showing that its operations, upon the advent of Transportation Unlimited, had become less costly, or more profitable, or that its controllable variable costs had decreased in areas other than Workers' Compensation, or that the employees of Transportation Unlimited were performing in a manner superior to the Respondent's former employees.

Coupled with the foregoing analysis showing that the net savings to the Respondent appear to be, at the most, negligible, is Sheridan's significant testimony that, "There's a lot more issues involved than just the workers' comp. Our preference is not to subcontract driver leasing—to driver leasing companies. You . . . do lose a degree of control, they're not our drivers, and that's a down side to having a driver leasing company there." And the testimony of Signars, who, like Sheridan, expressed reservations about subcontracting, is similarly significant. Thus, Signars testified that his main objection to subcontracting was the "training curve, learning curve of the [new] drivers," as "we would have to, you know, put that much additional training if we changed the driving force, that was . . . my main negative to it."

Further, Kudsi acknowledged that there were no guarantees that new drivers hired by Transportation Unlimited would be as productive as the discharged drivers, or that Smurfit would be as satisfied with their performance.

Of overriding significance, however, is the admitted possibility that despite the Respondent's dissatisfaction with its employee complement, it could have ended up with precisely the same employee complement, but at greater cost to it, had Transportation Unlimited hired all of the Respondent's drivers. Indeed, from the emphatic testimony of the Respondent's witnesses that the Respondent maintained a totally hands-off approach to the hiring process, it is reasonable to assume that Transportation Unlimited would find the Respondent's exdrivers eminently qualified to drive the identical equipment

on the identical routes that they had driven the day before; and under these circumstances it appears more likely than not that most, if not all, of the same drivers would have been hired.

Kudsi's testimony clearly shows that the most significant motivating factor in his decision to subcontract was the Respondent's difficulty, after intensive efforts, to enlist the drivers' cooperation with the Quality Action Program. Thus, as set forth above, Kudsi testified that:

All I can say is that the decision was based on that we had not been successful in achieving success in those specific areas, you know, which you may look at as a management failure. We had not been successful with the prior group.

It should be noted that this was the first and only occasion in Kudsi's experience as region distribution manager of region H, a region with 25 accounts, when management failure and lack of success in motivating the employees allegedly caused the wholesale dismissal of the entire work force.

The record evidence makes it abundantly clear that the drivers' initial union activity was designed to obtain a wage increase; that the Respondent's perceived management failures and lack of success is attributable to the employees' unwillingness to accept anything less than a significant wage increase; and that the Respondent's attempts to allow the employees some autonomy in redistributing a finite wage and benefit package resulted in failure. Clearly, as found above, it was anticipating renewed union activity. Moreover, it is clear, as evidenced by the fact that the Respondent spent \$50,000 on a labor consultant to defeat the Union at a time when the Respondent's profitability was in jeopardy, that the Respondent deemed unionization of its Smurfit drivers to be unacceptable.

With no guarantees or even a reasonable expectation that Transportation Unlimited would hire a new complement of drivers, and, if it did, with no assurance that the new drivers would be any more productive in the areas of reducing controllable variable costs or increasing mileage per gallon, the record evidence establishes that the subcontracting to Transportation Unlimited was contrived for a different purpose. I conclude, in the absence of convincing credible evidence to the contrary, that the Respondent's true motivation was dictated not by legitimate business necessity, but by the desire to thwart the imminent resurgence of union activity among the Smurfit drivers who, as Gates expressly predicted, would soon select the Union as their collective-bargaining representative.

In summary, on the basis of the foregoing, I find that the Respondent has not shown that it would have discharged its drivers and contracted the work to Transportation Unlimited even in the absence of any anticipated recurrence of union activity, and I further conclude that by discharging its drivers on September 30, the Respondent has violated and is violating Section 8(a)(3) of the Act, as alleged.

Accordingly, for the reasons set forth above, I find that the Respondent has violated Section 8(a)(1), (2), and (3) of the Act, as alleged. I do not find however, that, as alleged in the complaint, the \$500 payment in June to each employee constituted a benefit designed to discourage the drivers from supporting the Union, in violation of Section 8(a)(1) of the

Act. At that point in time the employees had decided to temporarily forego union representation. While the \$500 payment constitutes evidence of domination and/or financial support of the employee committees, it was not designed, at that point in time, to cause the employees to abandon their union activity.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) of the Act by threatening employees with discharge in the event they select the Union as their collective-bargaining representative.
4. The five employee committees are labor organizations within the meaning of Section 2(5) of the Act.
5. The Respondent has violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation and administration of the five employee committees.
6. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging its employees and contracting with Transportation Unlimited, Inc. to provide employees for the Smurfit account, in order to preclude the said employees from selecting the Union as their collective-bargaining representative.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (2) and (3) of the Act, I recommend that it be required to to cease and desist therefrom and from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice attached hereto as Appendix.

Having found that the Respondent unlawfully dominated and assisted the formation of the five employee committees, and that the committees have been previously disestablished, I recommend that the Respondent refrain in the future from reestablishing the same or similar committees.

Having found that the Respondent unlawfully discharged its employees named in the complaint and that it contracted the work to Transportation Unlimited, Inc., I recommend that it cancel its contract with Transportation Unlimited, Inc., offer the employees named herein immediate and full employment, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and benefits they may have suffered by reason of the Respondent's discrimination against them. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 181 (1987).

[Recommended Order omitted from publication.]